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NAVIGATING LOSS: A BANK'S GUIDE TO MANAGING THE DEATH OF A CUSTOMER

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As Benjamin Franklin once said, "in this world nothing can be said to be certain, except death and taxes." While banks cannot help with taxes, they certainly play a role in the handling of financial assets after a customer passes. The death of a customer presents a unique set of challenges for banks. Community banks in particular must show sensitivity to a grieving family while also navigating procedural and legal obstacles to ensure proper handling of the deceased's assets. This article outlines some of the initial steps to be taken and logistics to be considered upon the death of a bank customer.

Initial Steps: Verification, Inventory, and Document Gathering

Upon hearing of a customer's death, the bank should request a copy of a certified death certificate and then once verified, determine what accounts the deceased individual had located at the bank, including deposit accounts, safe deposit boxes, loans, and any

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other financial products held with the bank. After assessing the customer's accounts and having a clear inventory of their financial holdings, the Bank should also request copies of (a) any existing last will and testament or trust documents which provide guidance on the decedent's wishes for asset distribution and where the deceased assets should be distributed, (b) a marriage certificate (if applicable) which provides crucial insight for determining spousal rights, and (c) a proof of legal name change (if applicable) to ensure the accuracy of account identification.

Deposit Accounts: Beneficiary Verification, Freezing Accounts, and Social Security Funds

To ensure funds are not misused, the deceased's accounts should, if possible, be frozen upon receiving verification of death. This can be done with single-owner deposit accounts, but jointly-held accounts with a surviving owner should remain accessible to the survivor. Single-owner accounts with a Payable-On-Death ("POD") designation require particularly careful handling. While a personal representative of the decedent's estate cannot unilaterally modify the POD beneficiary designation for the account after the customer's death, a will can supersede and alter the beneficiary if the will specifically mentions the POD account. Thus, POD accounts should not be paid out automatically upon hearing a customer has passed.

For accounts which do not have a POD designation, or where the POD beneficiary pre-deceased the original account holder, funds from the account should be distributed to the original account holder's personal representative or heirs, as the case may be. If none of the following apply, or if the bank knows of disputes as to the beneficiaries of the estate, the bank should hold the funds until directed to make a distribution by a court. It is also worth noting that Social Security payments often continue for a period following the customer's death. These must be tracked, and any funds deposits made after the date on the certificate of death must be returned to the Social Security Administration.

Outstanding Loans: Probate and Demand for Notice as a Creditor

Following the passing of a customer, the bank—as a creditor—must assess all outstanding loans held by the deceased. For

secured loans, the bank may need to consider foreclosing or repossessing the collateral if the loan remains unpaid. To recover on unsecured loans that had been made to the decedent, the bank must consider whether it needs to pursue legal action against the decedent's estate. In various cases, another party (such as the decedent's personal representative or a particular beneficiary) will need to be named and involved in the proceeding as well.

If the bank decides to pursue legal action against the estate, it should file a "demand for notice" with the appropriate probate court. For Minnesotans, this is generally located in the county where the customer resided at the time of death. The demand for notice will include the decedent's name and date of death, the bank's contact information and interest in the estate, and demand notice of orders and filings related to the decedent's estate. In the event of a probate application for the decedent, the court will send the bank's demand for notice to the filer, and the filer must then send the bank a notice of the probate proceeding. After receiving notice of the probate, the bank may file a written statement of claim, which must be satisfied before the probate court can close the case.

Considerations for Single-Member LLCs

Unique challenges arise when a deceased account holder was the sole owner of a single-member limited liability company with business accounts held at the bank. While the personal representative of the decedent's estate may seek access to the LLC accounts, the bank should deny access until a new authorized signer for the LLC accounts has been appointed. The LLC is a separate legal entity from the deceased, and while the decedent may have been the only individual with an interest in the LLC, the LLC's assets are not part of the decedent's personal estate. The new signer may or may not be the personal representative, but until the bank receives a valid resolution appointing a new authorized signer for the LLC's account, any funds within the LLC's business accounts should not be accessed.

The death of a bank customer can pose many issues and special circumstances. Because of the fact-dependent nature of estate and probate matters, banks should not hesitate to seek legal guidance about individual situations, especially when a deceased customer's business and other financial condition was unique or complex.

THE IMPORTANCE OF RESPONDING TO GARNISHMENTS

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Many, if not most, of the lenders who are reading this article have probably responded to one or more garnishments in their career. Many lenders see these collection tools as an administrative burden to respond to – and a burden they are not adequately compensated for with the nominal $15.00 fee that must be served with the garnishment pleadings. That said, lenders should take seriously their responsibility to timely respond to these garnishments since the failure to do so can have serious financial consequences for a lending institution.

Garnishments are frequently utilized by a party who has obtained a judgment against that party's debtor. Once a judgment is entered in favor of a creditor and against a debtor, the creditor becomes a "judgment creditor" and the debtor becomes a "judgment debtor." The judgment creditor will then typically investigate and pursue assets owned by the judgment debtor to satisfy the judgment.

One of the easiest and most cost-effective ways to collect on a judgment is to garnish funds in a judgment debtor's bank account. When funds are garnished, they are frozen and can be seized by the judgment creditor in partial or full satisfaction of the judgment entered against the judgment debtor. Instead of seizing machinery, equipment, or livestock owned by a judgment debtor – which can be both expensive and a hassle to physically seize, store, and thereafter liquidate – it is far more convenient and typically less expensive to simply go after the cash in that judgment debtor's bank account.

The typical situation that Minnesota-based lenders may encounter involves a judgment creditor serving a "Garnishment Summons," a "Nonearnings Disclosure Form," and an "Important Notice" and "Instructions" form directed to the judgment debtor. One goal of this article is to highlight the importance of the "Garnishment Summons" directed to the lender receiving the garnishment pleadings (i.e., the "garnishee"). The "Garnishment Summons" is important because that pleading may be served by "certified mail, return receipt requested" in addition to personal service. Minn. Stat. § 571.72, subd. 2. Once the "Garnishment Summons" is served upon the "garnishee" lender, the district court identified on the caption of that pleading obtains personal jurisdiction over the garnishee lender. It is, therefore, very important that anyone who signs a receipt for certified mail to ensure

these garnishment pleadings are delivered to the appropriate person at the lending institution to ensure the garnishee timely responds to the garnishment.

If, as is the case with most lenders responding to a garnishment, the garnished assets are "any indebtedness, money, or property *other than earnings*[,]" then the "garnishee" lender must provide "a written disclosure, of the garnishee's indebtedness, money, or other property owing to the debtor" within twenty (20) days after the garnishment summons is served. Minn. Stat. § 571.72, subd. 2(3) (emphasis added). Responding to the garnishment pleadings in both an accurate and timely manner is critical because if a garnishee fails to complete and serve a disclosure as required by Minnesota law, then "the court may render judgment against the garnishee, upon motion by the creditor, *for an amount not exceeding 110 percent of the amount claimed in the garnishment summons*." Minn. Stat. § 571.82, subd. 1 (emphasis added). While it may not be common for a court to enter judgment against a garnishee who fails to respond to a garnishment summons, the author of this article has seen it happen.

Thus, the "takeaway" for this article is that if you are a "garnishee" lender – or any "garnishee" for that matter – be sure you timely and accurately respond to garnishment pleadings within the statutory deadline for doing so. A garnishee should never fail to respond to garnishment pleadings because failing to complete and serve the required disclosure may result in judgment being entered against that garnishee for up to 110% of *someone else's* judgment debt.

REPLEVIN ACTIONS: OBTAINING POSSESSION OF PERSONAL PROPERTY PRIOR TO FINAL JUDGMENT

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Replevin actions are a versatile tool for obtaining or regaining personal property which you have the right to possess. In Minnesota, replevin actions are also known by the more modern phrase, "claim and delivery of personal property," and are governed by a statutory scheme found in Minnesota Statutes chapter 565. Lenders often use replevin actions to obtain personal property in which they have a security interest, when a debtor has defaulted under the terms of the loan secured by said property. However, a secured-lending relationship is not the only context in which a replevin action may be useful. Some other examples include recovering converted, stolen, or lost property[1] or determining the ownership of disputed personal property.[2] The key advantage of a replevin action is that the claimant can seek possession of the property during the pendency of the action, allowing the claimant to preserve the property and prevent it from being sold, destroyed, damaged, or hidden.

To obtain possession of property prior to a final judgment, a lawsuit must be initiated against the person who has possession of the property to be recovered, known as the respondent, and the person seeking to recover the property, known as the claimant, must file a motion with the court. In most situations, the claimant must give the respondent notice that the claimant is seeking an order of the court, and the court must hold a hearing, where both parties can be heard, before issuing an order for seizure and delivery of the property.[3] In some situations, a claimant can obtain their order prior to notice and hearing.[4] To recover possession prior to notice and hearing, the claimant must show that (1) a good faith effort to inform the respondent of the motion was made or informing the respondent would endanger the claimant's ability to recover the property, (2) the claimant is likely entitled to possession of the property, (3) the respondent is about to either remove the property from the state or conceal, damage, or dispose of the property to hinder, delay or defraud the claimant or the claimant will suffer irreparable harm if possession of the property is not obtained prior to a hearing, and (4) the only way to protect the claimant's interest in the property is by an order for seizure of the property.[5]

A motion for recovery of property must be accompanied by an affidavit setting forth the property to be recovered, the facts and evidence showing the claimant's right to possession of the property and any underlying obligation supporting that right, facts showing that the respondent is wrongfully detaining the property, in the case of security interests, information about the underlying obligation, in the case of a contractual breach for a reason other than failure to pay money, facts regarding the underlying contract and breach, and a good-faith approximation of the current market value of each item claimed.[6] For lenders, the evidence necessary for a motion for recovery of property will be all relevant loan documents, including promissory notes, loan agreements, and security agreements and all documents evidencing perfection of the security interest including filed UCC-1 Financing Statements and lien cards. Lenders will also need to provide the original principal amount of the underlying obligation, the amount paid to date, and the amount due and owing. When a claimant seeks an order for seizure of property prior to notice and hearing, the affidavit accompanying the motion will also state facts establishing the grounds for the pre-hearing seizure.[7]

By statute, a claimant must post a bond which is 1.5 times the fair market value of the property to be seized in order to be entitled to possession of the property.[8] The purpose of the bond is to protect the claimant in the event the property is sold or damaged by the claimant, and the court later decides the claimant did not have a right to the property.[9] Upon entry of final judgment, the

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[1] *Storms v. Schneider*, 802 N.W.2d 824 (Minn. Ct. App. 2011); *Somers v. Kane*, 162 Minn. 40, 202 N.W. 27 (1925).
[2] *A & A Credit Co. v. Berquist*, 230 Min. 303, 306, 41 N.W.2d 582, 584 (1950).
[3] Minn. Stat. § 565.23.
[4] Minn. Stat. § 565.24.
[5] Minn. Stat. § 565.24, subd. 2.
[6] Minn. Stat. § 565.23, subd. 1.
[7] Minn. Stat. § 565.24, subd. 1(2).
[8] Minn. Stat. § 565.25, subd. 1.
[9] Minn. Stat. § 565.25, subd. 2(b).

bond is released back to the claimant, assuming the judgment is in the claimant's favor. In some instances, the bond may be waived. A respondent may also post a bond in order to regain or retain possession of the property in the lesser amount of either 1.25 times the fair market value of the property of 1.5 times the claimant's claim.[10] In lieu of filing a bond, a party may deposit cash, a cashier's check, or a certified check with the court.[11]

If a claimant shows they are likely to be entitled to possession of the property, subject to any bonding requirement, discussed below, the court must issue an order for seizure of the property, unless it finds that (1) the respondent has a fair defense which, if established, would entitle the respondent to retain possession of the property, (2) the respondent's interests cannot be protected by a bond, and (3) the respondent will suffer greater harm from seizure of the property than the claimant will suffer from non-seizure of the property.[12] If the court does not order seizure of the property, it can order that the respondent make partial payment of the debt due, post a bond, allow inspections, restrain the respondent from things like selling, disposing, or otherwise encumbering the property, or otherwise take action to protect the rights of the claimant.[13] An order for seizure of property will direct the sheriff of the county where the property is located or may be found to seize the property and specify places that the sheriff may forcibly enter to seize the property.[14] The order will also authorize the sale or other disposal of the property by the claimant, unless the court finds that the interests of the respondent cannot be adequately protected by a bond.[15]

Replevin actions, or actions for claim and delivery of personal property, are a key component of most actions to recover debts secured by personal property, as well as a useful means for obtaining and determining title to personal property in other situations. Chapter 565's robust framework allows lenders and others with claims to property possessed by others to protect their rights in a swift and efficient manner, without waiting for the often slow wheels of normal litigation to turn, while still affording borrowers and possessors due process of law and mechanisms to protect themselves as well, without prejudicing the claimant.

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[10] Minn. Stat. § 565.25, subd. 2(a).
[11] Minn. Stat. § 565.25, subd. 4.
[12] Minn. Stat. § 565.23, subd. 3.
[13] Minn. Stat. § 565.23, subd. 4.
[14] Minn. Stat. § 565.26.
[15] *Id.*

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